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In the Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD NEAL SCHOWENGERDT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a civilian employee of the Navy who worked on classified weapons-related projects in a workspace that was subject to stringent and comprehensive security measures had a reasonable expectation of privacy in the contents of a credenza located in his office.

2. Whether the employee's constitutional rights were violated when the Naval Reserve discharged him pursuant to regulations that mandate the discharge of bisexuals.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A17, is reported at 944 F.2d 483. A prior opinion of the court of appeals, Pet. App. C1-C27, is reported at 823 F.2d 1328. The judgments, opinions, and orders of the district court, Pet. App. B1-B82, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1991. The petition for a writ of certiorari was filed on December 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner worked for the Navy as a civilian engineer on classified weapons-related projects. He also was a Chief Warrant Officer in the Naval Reserve, assigned to a missile test center. Pet. App. A4.

In his civilian job, petitioner worked at the Naval Industrial Ordnance Plant (NIOP) in Pomona, California. The NIOP, a 160-acre facility, is owned by the Navy and operated by General Dynamics Corporation. Pet. App. B6. Because the NIOP houses numerous top secret and secret military weapons projects, the Navy and General Dynamics employ extensive and stringent security measures. For example, chain link fences topped with barbed wire and interwoven with electronic sensing devices surround the NIOP. A steel cable is installed in the fence several feet above ground so that vehicles cannot penetrate it. Gates are secured by guard stations and hydraulic barriers that block vehicular passage until inspections have been conducted. Closed circuit cameras located throughout the NIOP are monitored by security officers 24 hours a day. *Ibid.*

To enter the NIOP, employees must display a picture badge that must be worn at all times on the upper left-hand side of the body. Guards are authorized to search all vehicles, including locked glove compartments, trunks, and closed containers. The Guard Force Policies and Procedures Manual *requires* guards to search every car leaving the NIOP after normal working hours. Pet. App. B9-B10.

To enter or exit a building at the NIOP, employees *must* open for inspection all packages, boxes, briefcases, purses, or other containers. Pet. App. E3. While in a building, employees and their belongings may be searched without their consent. *Id.* at B10. Secu-

rity guards have access to keys to all offices and office furniture, and they conduct frequent searches—both scheduled and random—of offices to ensure classified documents are properly stored. *Id.* at A5.

Not only are offices searched routinely by security guards, they are also searched routinely by the employees themselves. The Navy has a self-monitoring program whereby employees, assigned on a rotating basis, verify that offices, desks, and files of co-workers are properly secured. Petitioner participated in this self-monitoring program, and when it was his turn to check other employees' offices, "he pulled on desk drawers to see if they were locked and, if not, '[he] might be inclined to look inside and see if there were any documents lying loose, classified documents.'" Pet. App. B10.

Petitioner had a secret security clearance, and he was familiar with the Plant's security procedures, having worked there for 13 years. Pet. App. A5. He worked in Building 4, which housed the largest number of classified documents at the NIOP, including top secret documents. Building 4 also contained "strong room[s] and closed areas," where extremely sensitive military documents and hardware were stored. *Id.* at B8. Building 4 was therefore one of the most heavily secured buildings at the NIOP. *Ibid.*

Petitioner often had observed security agents searching his office to ensure compliance with procedures relating to the proper stowage of classified documents. Pet. App. B11. Additionally, he attended periodic security briefings where he was instructed that the government's concerns extended beyond the proper storage of classified documents and included, as well, concerns that employees not become involved in activities that might make them susceptible to blackmail. *Id.* at B15. Specifically, petitioner knew

that an applicant's sexual habits could influence the decision to grant a security clearance and, in obtaining his security clearances, petitioner had been questioned about his sexual habits. *Id.* at B8-B9. He had also received training on the security-related searches conducted at the NIOP and the duty of employees to submit to these searches. *Id.* at B13.

b. A security investigator for General Dynamics, Charles Kessel, received an anonymous tip that petitioner stored material in the lower left-hand drawer of his office credenza that would be "of interest to the security department." Pet. App. A5. After petitioner left work, Kessel entered petitioner's office, opened the lower left-hand drawer of petitioner's credenza and found a manila envelope that stated: "Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it." *Id.* at A6.¹ The envelope contained correspondence and photographs indicating that petitioner was involved in extra-marital activities. *Ibid.*²

¹ The parties dispute whether petitioner's office and credenza were locked. For purposes of this case, the court of appeals assumed that both were locked. Pet. App. A5-A6, B19.

² The correspondence in the envelope indicated that petitioner solicited sexual encounters through ads in "swingers" magazines and clubs. Petitioner wrote to women and men with whom he sought sexual relationships. He included in his letters his office telephone number, his Navy engineer business card, and reference to the fact that he worked for the Navy as a missile engineer. He also included nude photographs of himself in sexually suggestive positions, and photographs of himself in full Navy uniform. One of the letters received by petitioner was from an Italian flight attendant who sought sexual relationships primarily with military personnel. See Pet. App. A6 & n.2, B17-B18.

Security Investigator Kessel took the manila envelope and showed it to the Navy commanding officer at the NIOP. After examining the envelope's inscription and contents, the commander became concerned that petitioner could become a target of blackmail. Pet. App. B18. He expressed his concern to the Naval Investigative Service, which immediately sent Agent Carl Jensen to the Plant to provide assistance.

Based on his examination of the envelope, Agent Jensen concluded that petitioner fit the profile of someone who could be susceptible to blackmail or contact by hostile intelligence agents. Pet. App. B21. Agent Jensen determined that further investigation was warranted, and he conducted an immediate search of petitioner's office. During the search, Jensen seized four items that suggested petitioner may be a security risk: (1) a Japanese/English dictionary with notes and phrases that could be evidence of contact by a foreign agent; (2) a checkbook from a private business operated by petitioner that could be related to his sexual encounters and in which foreign agents might be identified; (3) gemstones in an envelope that could be used to pay potential blackmailers; and (4) several photographs of unidentified women. *Id.* at B20-B21. Jensen also interviewed petitioner, who admitted to being bisexual, but denied being a security risk. *Id.* at A4, B22.³

Following a comprehensive investigation, Agent Jensen concluded that petitioner had not been contacted by hostile agents and was not the target of

³ Petitioner stated that he kept the correspondence at his office because he wished to keep it secret from his family. He also wanted access to the correspondence during the day, he explained, because he composed letters regarding his sexual activities while at work. Pet. App. B16-B17.

blackmail. Jensen wrote a report of his investigation, which he sent to various federal offices responsible for maintaining security, including petitioner's commanding officer in the Naval Reserve. Pet. App. A7. Petitioner received an oral admonition from his supervisor at the NIOP for exercising poor judgment in storing the material in his office, but his security clearance and duties remained unchanged. *Ibid.*

The following year, petitioner resigned from the NIOP and took a job in the private sector with a military contractor. In the process of transferring petitioner's security clearance from government employment to private employment, the agency responsible for monitoring security clearances asked the Navy whether any evidence in petitioner's file could reflect adversely on his security status. The Navy provided Agent Jensen's report, which prompted a renewed inquiry into petitioner's background that contributed to a 13-month delay in his being granted a security clearance. Pet. App. A7.

In the meantime, when the Naval Reserve received Agent Jensen's report, it commenced administrative discharge proceedings pursuant to regulations mandating the discharge of bisexuals.⁴ The proceedings were triggered by petitioner's admission to Agent Jensen that he was bisexual and his descriptions of his bisexual activities in the correspondence seized in

⁴ The regulations define "bisexual" as "a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts." Secretary of the Navy Instructions 1900.9D § 5.b (1981). The regulations mandate the separation of bisexual service members if "[t]he member has stated that he or she is a * * * bisexual unless there is a further finding that the member is not * * * bisexual." *Id.* § 7.b.2. See Pet. App. A14-A15 n.7.

his office. At the administrative hearing, petitioner denied admitting that he was bisexual, and he alleged that his description of his bisexual activities was fantasy-writing. The board found, however, that petitioner was bisexual and recommended that he be honorably discharged. Pet. App. A7-A8.

Petitioner was honorably discharged. Pet. App. A7, D5. He sought review before the Board for Correction of Naval Records, but the Board denied him relief. *Id.* at D5-D6.

2. As relevant here, petitioner filed a *Bivens* claim alleging that the government's agents violated his constitutional right to privacy when they searched his office. Pet. App. D1-D7. Additionally, petitioner alleged that his discharge from the Naval Reserve was unlawful, and he sought declaratory and injunctive relief compelling reinstatement. *Id.* at D5-D6.

The district court granted summary judgment to the government. Pet. App. B1-B82.⁵ The court rejected petitioner's Fourth Amendment claim on two grounds: (1) that petitioner had no reasonable expectation of privacy in his office or its contents; and (2) that the searches were reasonable and work-related. *Id.* at B29-B34, B50-B51. The court also rejected petitioner's challenge to his discharge from the Naval Reserve. *Id.* at B69-B82.

3. The court of appeals affirmed. Pet. App. A1-A17. It first held that, given the pervasive and stringent security measures at the NIOP, petitioner had no

⁵ The district court initially dismissed all of petitioner's claims pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. A8. The Ninth Circuit in a prior opinion reversed and remanded the district court's Fourth Amendment ruling and remanded petitioner's claims involving his discharge from the Naval Reserve. *Id.* at C1-C5.

reasonable expectation of privacy in his office or its contents. The court observed that all employees were “well aware” of the “extremely tight” security procedures, *id.* at A11:

— Upon entering and leaving the building, and in the innermost recesses of their offices, employees were constantly being searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place.

Whether locked or not, [petitioner’s] office was searched daily, in his absence, by guards specifically looking for security violations.

— Under these circumstances, the court concluded that petitioner had no reasonable expectation of privacy in his office, his locked credenza, or the manila envelope. “The inscription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail,” the court added. *Id.* at A13.⁶

The Ninth Circuit also upheld the district court’s rejection of petitioner’s claims involving his discharge from the Naval Reserve. The First Amendment was not violated, the court held, because petitioner “was not discharged for writing about bisexuality but rather for *being* a bisexual, of which his purely private correspondence was evidence.” Pet. App. A14. The procedural due process guarantee of the Fifth Amendment was not violated because petitioner was afforded “abundant opportunity to object to his discharge and to have his objections heard by an administrative board, before as well as after termina-

⁶ The court of appeals did not address the district court’s alternative holding that the search was permissible as a reasonable, work-related search. Pet. App. A10 n.4.

tion.” *Id.* at A15. Petitioner’s substantive due process argument was held to be foreclosed by longstanding Supreme Court and Ninth Circuit precedent. *Ibid.* Finally, the court of appeals held that petitioner’s discharge was not arbitrary and capricious because substantial evidence supported the Navy’s conclusion that he was bisexual and therefore unsuitable for military service. *Id.* at A16.⁷

ARGUMENT

Both courts below found that, in light of the stringent and comprehensive security measures in effect at the NIOP, which included daily searches of his office, petitioner had no reasonable expectation of privacy in his office or its contents. The court below therefore held that no Fourth Amendment violation occurred when respondents searched petitioner’s office. Those courts also held that the Naval Reserve lawfully discharged petitioner pursuant to regulations mandating the discharge of bisexuals. Those rulings are fully supported by the record, are consistent with this Court’s precedents, and do not conflict with the decisions of any court of appeals. Further review is not warranted.

1. a. In *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987), a plurality of this Court held that “[p]ublic employees’ expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.” Further, the plurality held

⁷ In addition, the court held that petitioner’s Ninth Amendment challenge to his discharge lacked merit, and noted that petitioner did not challenge his discharge on equal protection grounds. Pet. App. A15 & n.8.

that “some government offices may be so open to fellow employees * * * that no expectation of privacy is reasonable.” *Id.* at 718. Following *O'Connor’s* approach, the Ninth Circuit assessed petitioner’s expectation of privacy “in the context of the employment relation” under the “actual office practices and procedures” at the NIOP, *id.* at 717, which included routine intrusive searches by security personnel and fellow employees. Pet. App. A3, B12. Based on “extensive uncontroverted evidence,” the court of appeals found that petitioner worked in a “peculiarly unprivate work environment” that afforded him no reasonable expectation of privacy in his office or its contents. *Id.* at A11-A12.

Petitioner challenges that finding, but it is amply supported by the record, which is not in dispute. Employees at the NIOP were “constantly being searched and surveilled for compliance with security precautions,” and these searches occurred “[u]pon entering and leaving the building, and in the innermost recesses of their offices,” Pet. App. A11. Petitioner worked in “one of the most heavily secured buildings” at the Plant, *id.* at B8, and his office, “[w]hether locked or not * * * was searched daily, in his absence, by guards specifically looking for security violations.” *Id.* at A11. Not only was petitioner’s office searched daily by security guards, it also was routinely searched by petitioner’s fellow employees pursuant to the Navy’s self-monitoring security program. *Ibid.* Petitioner himself said that, when it was his turn to search other employees’ offices, he felt obliged to open unlocked drawers to ensure documents were properly stored. *Ibid.* Petitioner knew, moreover, that security investigators had access to all keys and were authorized to search an employee’s locked office and desk “when an indication

that a security compromise ha[d] been made or [was] being contemplated by an employee because of some reason which ha[d] come to [the investigator's] attention," *id.* at A13 n.6.

Moreover, petitioner acknowledged that the Navy had a compelling interest in protecting classified information and that this interest justified investigating situations where an "employee[]" might be tempted to sell classified information, or might be either induced or blackmailed into divulging information as a result of romantic or sexual liaison." Pet. App. A12 n.5. Indeed, petitioner conceded that Security Investigator Kessel acted properly when he searched petitioner's credenza in response to a tip that it contained material regarding a potential security breach. *Id.* at A13 n.6. Petitioner also conceded that, in light of the inscription on the manila envelope, Kessel acted properly in examining the material in it. *Ibid.* Those concessions and the undisputed facts undermine any argument that petitioner had a reasonable expectation of privacy in his office or any of its contents.⁸

b. Petitioner also contends that Security Investigator Kessel violated the Fourth Amendment when he seized the manila envelope because he "should have

⁸ Petitioner contends that both courts below overlooked a material fact: namely, that *security guards* were not permitted to search personal materials "unless such material fell into the class of prohibited materials * * * such as guns, knives, explosives, etc., or were government or contractor equipment or materials," Pet. 12. Petitioner's office was searched by a security *investigator*, not a security *guard*, however, and it is undisputed, Pet. App. A13, that the investigatory power of the former exceeds that of the latter. Indeed, petitioner conceded that Security Investigator Kessel was empowered to search petitioner's credenza and the manila envelope. *Id.* at A13 & n.6.

recognized the intimately private nature of the material in the manila envelope and left it alone” or “discussed the subject with [petitioner] * * * rather than seizing the material,” Pet. 15-16. But when a security investigator conducts a lawful search—as petitioner concedes Kessel was doing when he searched petitioner’s office, Pet. App. A13 n.6—and discovers material that raises a reasonable suspicion that an employee may be a national security threat, the investigator is empowered to seize the material in furtherance of the investigation. A contrary conclusion would provide an employee with the opportunity to destroy incriminating evidence regarding the compromise of classified information.

Petitioner also argues that Kessel should have confronted petitioner with the envelope after seizing it, rather than showing it to his superiors. Pet. 16. This argument, however, is directed not to the legality of the seizure, but to the conduct of the investigation after the seizure. Security decisions of that nature are committed to the discretion of the Executive Branch. See *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

2. a. Petitioner also seeks review of the court of appeals’ holding that the Navy permissibly discharged him from the Naval Reserve pursuant to regulations that mandate the discharge of bisexuals. Petitioner’s principal argument is that the Navy’s finding that he was bisexual lacked support by substantial evidence. Pet. 19. Because both lower courts have reviewed and sustained that factual finding, it does not merit this Court’s attention. See, e.g., *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n. 5 (1985). In any event, the Navy’s finding is amply supported by Agent Jensen’s statement that petitioner admitted that he was bisexual. Pet. App. A16.

b. Finally, petitioner urges this Court to review the court of appeals' rejection of his constitutional challenges to the Navy's regulations mandating the discharge of service members who commit homosexual acts. Pet. 17. The Ninth Circuit's decision, however, is consistent with that of every other court of appeals that has considered this question. *E.g.*, *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller v. Midden-dorf*, 632 F.2d 788 (9th Cir. 1980) (Kennedy, J.), cert. denied, 452 U.S. 905 (1981). See *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (FBI agents). Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986). This Court twice recently declined to review this question. Nothing has occurred since then that warrants different treatment of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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